BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

Opinions of the Court Below.

The majority and minority opinions of the Circuit Court of Appeals (R. 1165-1173) are reported in 137 F. (2d) 576. Regulations 19.515 to 19.525 of the Federal Security Administrator are set forth at R. 1162-1165.

B.

Jurisdiction.

Section 701 (f) (4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1046, 1055, expressly provides for review by this Court upon certiorari as provided in Sections 239 and 240 of the Judicial Code, as amended.

C.

Statute Involved.

The pertinent portions of Section 401 of the Act are set forth at page 1 above. The Act further provides as follows:

> Section 701 (e) * * * The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based.

D.

Statement of the Case.

The facts are briefly stated in the petition. A more comprehensive and detailed statement of the facts and argument can be found at R. 1100-1124, wherein petitioner's memorandum in support of exceptions to the proposed order appear. We wish, however, to add the following:

The Administrator has fixed two definitions for the product now known as cream cheese. He has fixed the fat and moisture standards for the product defined as "cream cheese" above that now generally found in the market. For the bulk of the existing product he has established a definition under the name of "neufchatel", a name completely foreign to the trade and consumers, and which at one time was applied to an inferior product. Under the latter name he has created a standard so low in fat that it does not represent any product now on the market, but the net result of which is to insure that the product will be as bad as the name.

E.

Specification of Errors to Be Urged.

The majority of the Circuit Court of Appeals erred:

1. In sustaining Regulations 19.515, 19.520 and 19.525, fixing and establishing definitions and standards of identity for cream cheese, neufchatel cheese and cottage cheese.

2. In holding that the practicability of the continued use of a common or usual name is not subject to judicial review, even though the denial of such continued use de-

prived the bulk of an industry of its good will in that name.

3. In failing to give any weight or consideration to standards for cream cheese previously promulgated by the Department of Agriculture, in accordance with which the industry has manufactured the product.

4. In failing to pass upon whether basic Finding 20 (R. 1151) was supported by substantial evidence and in failing to find that most cream cheese does not conform to the definition established.

5. In failing to reject the Administrator's arbitrary omission to make the 2 percent adjustment for moisture found to be necessary—an omission which the court itself characterized as "peculiar to say the least".

6. In failing to hold that the exclusion of the use of water was invalid in that there was no finding of any reason to exclude the use of water in the hot-pack process.

7. In holding that there was evidence that in good commercial practice water is not used in the manufacture of cream cheese by the hot-pack process.

8. In holding that there were findings that skim milk used in the manufacture of cottage cheese is "usually" pasteurized whereas there were no such findings.

9. In failing to hold that the Administrator had ignored the evidence as to the use of unpasteurized skim milk and had failed to make any finding to support its exclusion from the cottage cheese standard.

10. In holding that the moisture limitation for cottage cheese was based on substantial evidence.

F.

Argument in Support of Granting the Writ.

POINT I.

The court below erred in failing to find that the cream cheese and "neufchatel" standards are invalid because they do not identify the product by its common or usual name so far as practicable.

The Act expressly provides (Section 401), and this Court has held (*Federal Security Administrator* v. *Quaker Oats Company*, 318 U. S. 218, 232), that the "standards are to be prescribed and applied, so far as is practicable, to food under its common or usual name". The court below is divided in its opinion as to whether the practicability of a name is a matter for its judgment (R. 1171, 1173). This question has never been decided by this Court. In the *Quaker Oats* case, there had been no attempt to deprive any manufacturer of its right to use the basic and common or usual name of the food in question, namely, "farina" (see Petition, *supra*, p. 7). This statutory limitation was placed by Congress upon the actions of the Administrator and it is for the judicial tribunal to determine whether the Administrator has acted within the limits of the power granted to him. *Morgan* v. *United States*, 298 U. S. 468, 479). The arbitrary imposition of a name neither common nor usual may be confiscatory, and the courts certainly have the power to so find it. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 217.

In the instant case the name "neufchatel", a name difficult to pronounce, foreign in sound, which many years back was used for an inferior product (Finding 45, R. 1155), and which is a misleading name, has been affixed to

the petitioners' product of cream cheese (O. P. Exhibit No. 9, R. 1045; fols. 1705-1712, 1778, 1864, 2077, 2122). The name thus affixed, does not "inform purchasers of what they are buying." *United States* v. *Antikamnia Chemical Company*, 231 U. S. 654, 665.

As found in the minority opinion below, the bulk of the industry have been deprived of their good will in the commonly used name without even the finding that it is impracticable to distinguish between cheese of different milk fat by the use of adjectives such as "light" cream cheese and "heavy" cream cheese. See *N. Fluegelman & Co.* v. *Federal Trade Commission*, 37 F. (2d) 59, 61; *Federal Trade Commission* v. *Casoff*, 38 F. (2d) 790, 791. Compare *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559; *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. The use of the name cream cheese constitutes a valuable property right of the petitioners which should not be destroyed if less drastic means can accomplish the result sought. If the end sought by the Administrator, which in this case evidently is to distinguish between high fat and low fat cream cheese, can be effected without hardship to petitioners and others in the industry, it cannot be said that a choice which results in hardship is reasonable or practicable. *Nolan* v. *Morgan*, 69 F. (2d) 471, 474. The end could have been achieved by requiring proper qualifying words to be used in immmediate connection with the name cream cheese. *Federal Trade Commission* v. *Royal Milling Co., supra.*

The record contains several practical definitive adjectives which could have been used (fols. 1230, 1528-1529, 2120-2121, 2266). Similar terms have been used by the Administrator in connection with other foods, for example, "light" cream and "heavy" cream (Federal Security Administrator Regulations, Secs. 18.500 to 18.515); "farina" and "enriched" farina, "flour" and

"enriched" flour, etc. There always has been retained at least the basic name of the food in question. This is the first attempt on the part of the Administrator to completely change a recognized common and usual name, and it is in the public interest that this Court determine whether the Administrator has that power.

POINT II.

The court below erred in sustaining standards for cream cheese and "neufchatel" which do not define the product as it exists.

The Act provides that the Administrator shall fix a "definition and standard of identity". To define is "to state precisely the meaning of; describe the nature and properties of". Funk and Wagnall's, New Standard Dictionary, Med. Ed. (1941). The Administrator's regulation for cream cheese does not describe the product defined by the Secretary of Agriculture for 40 years as cream cheese, nor the product known to the industry and consumers by that name. The Government's chief witness bluntly stated that he was not fixing a standard based on what exists today (fols. 2378, 2617). The court below erred in sanctioning such practice and in failing to consider existing definitions and standards and the existing product.

Congressional intent in determining whether existing definitions should be followed, and the major portion of a product described in fixing a definition, can be gathered from the legislative history of the Butter Standards Act of 1923, 42 Stat. 1500, cited by this court in the *Quaker Oats* case (p. 232), by which Act Congress itself fixed a standard for a dairy food. The butter standard was fixed in accordance with the definition established by the Joint Committee on Definitions and Standards and by the Department of Agriculture (*Federal Security Administrator* v. *Quaker Oats Company*, 318 U. S.

218, 233; 64 Cong. Rec. 3229), the same agencies which established the definition for cream cheese which the Administrator is attempting to change (tols. 18-22), and in accordance with requirements which the industry as a whole favored (64 Cong. Rec. 3232).

The standard for cream cheese established by the Joint Committee on Definitions and Standards and by the Department of Agriculture define cream cheese as containing not less than 65 percent milk fat in the water-free substance (Service and Regulatory Announcements, Food and Drug No. 2). The entire industry has been manufacturing cream cheese in accordance with this standard, containing less than 33 percent fat and more than 55 percent moisture. The Administrator's standard raises the fat requirement from 65 percent to about 78 percent in the water-free substance (Finding 39, R. 1154). This standard does not describe most cream cheese as it now exists.[3]

While the Administrator purports to find that "most of the product marketed today as cream cheese" contains more than 35 percent fat and less than 55 percent moisture (Finding 20, R. 1151), the lack of any evidence to support these findings is demonstrated by Government's Exhibits Nos. 2, 4, 13 and 14, and by the testimony of all of the manufacturers (see Appendix).[4] The court below,

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(3) Government Exhibits Nos. 2 (R. 367-371) and 4 (R. 1013-1025) consist of tabulations of fat and moisture tests of random samples of cream cheese gathered by Government investigators in various cities. A count of these samples demonstrates that a majority do not comply with the standard. An examination of Government Exhibit No. 12 (R. 1041), which gives the maximum and minimum fat and moisture content of the samples contained in Exhibit 2, shows that the 96 samples there tested (See Exhibit 2), of which 57 do not comply with the standard, are distributed among 37 brands, and that of these 37 brands only 5 consistently comply with the standard. Government Exhibit No. 13 (R. 1042) demonstrates that of 71 brands, 63 do not consistently conform to the standards fixed. An examination of the 48 samples of cream cheese collected in New York City and tabulated in Government's Exhibit No. 4 (R. 1021-1022) indicates that 43 out of 48 samples do not comply.

(4) Even the Administrator in his answering brief in the court below, would not go as far as his own findings that the product was made *within* the limits fixed, but only *approximating* such limits (Respondent's brief below, pp. 19, 20, 34). An examination of the references to the record to determine the meaning of the word "approximating" indicated that the approximation was never *within* the limits fixed.

misconstruing the Administrator's Finding 20, held "that much, if not most of the cream cheese sold *before the discovery of the 'hot-pack' process* contained from 35 to 40 percent of fat and from 55 to 50 percent of moisture". (Italics supplied, R. 1171.) That would be before 1927. But that is not the Administrator's finding on which he bases his standard. The administrator's finding is that "*most* of the product marketed *today* as cream cheese" contains the said fat and moisture percentages. The result of this misconstruction was that the court failed to examine the evidence to ascertain whether basic Finding 20, as made, was supported by substantial evidence.

The Act requires that the Administrator "base his order only on substantial evidence of record", and "set forth as part of his order detailed findings of fact on which the order is based" (Section 701 [e]). An order based on a finding which is not supported by evidence is an arbitrary act against which the courts afford relief. *Northern Pacific Ry.* v. *Department of Public Works*, 268 U. S. 39, 44. It is not the court's function to make findings but to examine the evidence to ascertain whether the findings made are properly supported. *Morgan* v. *United States*, 298 U. S. 468, 480, 481; *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258, 260.

A definition promulgated by the Secretary of Agriculture must be presumed to have been arrived at fairly and to describe the product in question, and should not arbitrarily be discarded in such manner as to destroy the good will of the bulk of the industry in the name of the product. Certainly that was not the intention of the President when he stated that the honest enterpriser would "be asked to do no more than he now holds himself out to do" (President's Message, House Rep. 2755, 74th Cong. 2d Sess., pp. 1-2), nor of Congress in stating that the Act "merely sets up checks against the small but un-

scrupulous minority" (House Report No. 2755, 74th Cong., p. 3). The petitioners are not "a small but unscrupulous minority"; they are the industry. The issue of whether the Administrator may thus disregard the industry as a whole, existing standards, and existing practice, has never been decided by this Court.

POINT III.

The court below erred in sustaining the Administrator's "peculiar" omission to make the necessary adjustment for moisture in the cream cheese standard.

The Administrator, as the basis for his regulations, found that cream cheese contains 35 percent or more fat and 55 percent or less moisture (Finding 20, R. 1151); that in good commercial practice fat and moisture in the finished cheese vary as much as 2 percent above or below the percentages which the manufacturer desires to obtain in the finished product (Finding 21, R. 1151); and that with due allowances made for the fat and moisture variations thus found, a reasonable minimum limit for fat is 33 percent and a reasonable maximum limit for moisture is 55 percent (Finding 23, R. 1151). Thus the 35 percent fat content was dropped to 33 percent, but the 55 percent moisture content was not raised to 57 percent.

The minority opinion in the court below characterizes the Administrator's action as "an arbitrary disregard of Finding 21" (R. 1173). The majority opinion characterizes his action as "peculiar to say the least", but endeavors to support the limitation of 55 percent moisture on the ground that "a product of more than 55 percent moisture, if not subjected to the 'hot-pack' process, acquires different but closely related characteristics of cream cheese" (R. 1171-1172). The fallacy of this statement is

demonstrated by the fact that all manufacturers make cream cheese containing more than 55 percent moisture, and that the best quality "cold-pack" cream cheese of the Kraft Cheese Company, contains more than 55 percent moisture (see Appendix). However, even if this were not the fact, there is no justification for basing a standard for "hot-pack" cream cheese upon the characteristics of "cold-pack" cream cheese, and any regulation which proceeds on such a premise is arbitrary, unreasonable and discriminatory.[5]

Inasmuch as Finding 23 recites that due allowance is being made for the moisture variance referred to in Finding 21, and then fails to make such allowance, the petitioners stated in their brief in the court below (p. 49): "Nowhere does the Administrator set forth any reason for omitting the adjustment as to moisture, and it may very well be, for all that appears, that the omission was inadvertent rather than intentional". Neither in argument or brief has this observation been answered. The Administrator's regulation is contrary to his own finding. The privilege of invoking judicial review is of purely illusory value if the reviewing court upon determining that the findings are supported by substantial evidence, fails to consider whether the findings support the regulation. An order, such as the Administrator's regulation with regard to the moisture content of cream cheese, which is in flat opposition to the findings should not be permitted to stand. *Chicago Ry. Co.* v. *U. S.*, 284 U. S. 80, 96, 100. Compare *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197.

(5) Because of the desirable characteristics which the hot-pack process imparts to the cheese a major and ever increasing portion of cream cheese is subjected to this process (See Appendix; fols. 1009-1010, 1582).

POINT IV.

The court below erred in failing to hold that the Administrator had arbitrarily and unreasonably excluded the use of water in the hot-pack process without any supporting finding.

In manufacturing cream cheese by the hot-pack process, a liquid is commonly used with which to heat the cheese and adjust the fat and moisture; the liquid may be cream, milk, skim milk or water (fols. 1357, 1805-1806, 2184). Only one manufacturer testified that he did not use water in the hot-pack process, but that manufacturer further testified that with their particular type of equipment they added no liquid at all (fol. 1649). The Administrator failed to provide for the use of water and thereby excluded its use. As the minority opinion below observed, there is no finding of any reason why the present practice must be discontinued.

The majority in the court below goes further than the Administrator's own findings and states that there was evidence that in good commercial practice water was not used (R. 1172). The court erred however, as there was no finding or evidence to this effect and the court could not cite such finding or evidence. The Administrator himself could not point to the testimony of a single witness who testified with regard to the manufacture of cream cheese to support the contention that in good commercial practice water was not used. On the contrary, the Government's own expert testified that water is better to add than skim milk (fol. 1728) and Government counsel himself stated that there was no issue as to how the adjustment is made (fol. 1807). The finished product must still comply with the fat and moisture requirements of the standard whatever liquid is added for the purpose of adjustment. The exclusion of the use

of water is in no way shown to promote honesty and fair dealing in the interest of consumers, which is the foundational basis of the Administrator's action. *Twin City Milk Producers Ass'n* v. *McNutt*, 122 F. (2d) 564, 566.

While it is true that it is not the function of the court to substitute its judgment for that of the Administrator, neither is it the function of the court to make findings for the Administrator. *Wichita R.R.* v. *Public Utilities Commission*, 260 U. S. 48, 54; *Florida* v. *United States*, 282 U. S. 194, 215. It is a specific requirement of the Act that the basic fact conditioning action by the Administrator be stated in a finding and stated there expressly (Section 701 [e]). There is no finding by the Administrator on which to base an order excluding the recognized use of water. In default of such a finding, the condition subject to which the legislative power was delegated has not been fulfilled. *Mahler* v. *Eby*, 264 U. S. 32, 44; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 448; *United States* v. *Chicago, Milwaukee R.R. Co.*, 294 U. S. 499, 504.

The provision for judicial review means more than a search for "some" evidence to support a particular finding. The evidence must be "substantial". Section 701 (e) of the Act; see *N. L. R. B.* v. *Columbian Enameling Co.*, 306 U. S. 292, 300; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229. Not only is there no substantial evidence to support the exclusion of the use of water, there is no evidence at all to support such a regulation, nor is there any finding of any reason why the practice must be discontinued. The court below erred in attempting to make a finding for the Administrator, and further erred in making a finding which is not based upon substantial evidence.

POINT V.

The court below erred in sustaining the Administrator's arbitrary exclusion of the use of unpasteurized skim milk in the manufacture of cottage cheese without any finding to support such exclusion.

Regulation 19.525 provides for the use of only pasteurized skim milk in the manufacture of cottage cheese. Although the petitioners and others presented considerable evidence concerning the use of unpasteurized skim milk in the manufacture of cottage cheese, and the necessity for its continued use (fols. 2010, 2012-2018, 2715, 2728, 2731, 2744, 2745, 2766, 2789, 2790), "the Administrator ignored the evidence as to the use of unpasteurized skim milk. He made no finding on the subject. The right to present evidence is a barren one if the trier of fact may fail to consider it. See *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. (2d) 258, 261 (C. C. A. 7)" (Swan, *J.*, R. 1173).

In the *Staley* case, the petitioner had appeared at the hearing and offered evidence to the effect that corn syrup is a suitable sweetening ingredient in sweetened condensed milk. The Administrator made no finding with reference to its use. The court held that "unless a specific finding is made with reference to corn syrup or an exclusive finding made with reference to refined sugar and corn sugar, the interests of the consumers have not been given that consideration which Congress had in view; consequently, the order is not made in accordance with law".

Similarly, in the instant case, the Administrator made no exclusive finding that only pasteurized skim milk is used in the manufacture of cottage cheese, nor has he made a specific finding with reference to the use of un-

pasteurized skim milk. Consequently the order is invalid. *Baltimore & Ohio R.R. Co.* v. *United States*, 293 U. S. 454, 463; *Mahler* v. *Eby, supra; Panama Refining Co.* v. *Ryan, supra.* The court cannot supply the finding which the Administrator failed to make. *Florida* v. *United States*, 282 U. S. 194, 215; *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 54.

Conclusion.

WHEREFORE, petitioners respectfully pray that the petition for writ of certiorari be granted, the cause reviewed, and the judgment of the Circuit Court of Appeals for the Second Circuit reversed insofar as error therein has been assigned by petitioners.

Respectfully submitted,

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APPENDIX.

The utter lack of uniformity of a minimum of 35 percent fat and maximum of 55 percent moisture is demonstrated by the following table:

MAXIMUM MOISTURE AND MINIMUM FAT IN NO. 1 **(Highest Quality)** CREAM CHEESES AS TESTIFIED BY ALL MANUFACTURERS WHO TESTIFIED AT HEARING

	Hot Pack Cream Cheese		**Cold Pack Cream Cheese**		
Manufacturer	Percent Maximum Moisture	Percent Minimum Fat	Percent Maximum Moisture	Percent Minimum Fat	Ratio of Hot Pack to Total Production
Breakstone	62 (fol. 588)	28 (fol. 588)	57 (fol. 587)	34 (fol. 586)	15% (fols. 587-588)
Borden	60 (fol. 2144)	31 (fol. 2144)	55* (fol. 766)	37 (fol. 766)	56% (fol. 1582)
Columbia	61 (fol. 1449)	29 (fol. 1352)			100% (fol. 1351)
Conestoga	60 (fol. 372)	25 (fol. 361)	57 (fol. 372)	34 (fol. 361)	75 to 80% (fol. 361)
East Smithfield	Not stated	31 (fol. 1301)			100% (fol. 1225)
Fairmont	58 (fol. 880)	33 (fol. 880)			Almost 100% (fol. 908)
Kraft	60 (fol. 1934)	Average 29.8 (fol. 1933)	58** (fol. 2098)	34.5 (fol. 2098)	Not Stated
Newark	60 (fol. 1819)	32 (fol. 1780)			100% (fol. 1815)
Rosedale	60 (fol. 346)	25 (fol. 337)	56 (fol. 346)	33 (fol. 337)	Not Stated
Zausner	60 (fol. 2105)	32 (fol. 2105)	57 (fol. 2105)	37 (fol. 2105)	Not Stated

*There is no indication in the record of any maximum or minimum. This figure must be presumed to be an average.

**According to testimony of Mr. Page. Dr. Stine, who also testified for Kraft, indicated that at different plants of the Kraft Company the moisture maxima varied from 52.1 to 57 percent (fols. 2180-2181).